

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
BENJAMIN K. CHIN	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1982.	:	

DETERMINATION

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In the Matter of the Petition	:
of	:
BENJAMIN CHIN,	:
OFFICER OF JUMBO HOUSE, INC.	:
for Revision of a Determination or for Refund	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law for the Period March 1, 1982	:
through August 31, 1983.	:

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Petitioner, Benjamin K. Chin, 384 Broome Street, Apt. 10, New York, New York 10013, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1982 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1982 through August 31, 1983 (File Nos. 802832 and 802500).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 17, 1989 at 9:15 A.M., with all briefs submitted by February 20, 1990. Petitioner appeared by George Pugh, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

## ISSUES

I. Whether petitioner, an officer of Jumbo House, Inc., a Chinese restaurant, who claims, however, that his position was ministerial only, is liable for a penalty under Tax Law § 685(g) for the failure of that corporation to pay over to the State income tax withheld from employees.

II. Whether petitioner was a person required to collect sales tax on behalf of Jumbo House, Inc. pursuant to Tax Law §§ 1131(1) and 1133(a).

III. Whether a penalty under Tax Law § 1145 for the late filing and late payment of sales and use taxes should be abated because a fire allegedly destroyed records.

## FINDINGS OF FACT

(a) Jumbo House, Inc. operated a Chinese restaurant in New York City. Its major shareholders were Mr. Tik Kuey Ng, Mr. Fee Yin Chan, petitioner, Benjamin Chin, and Mr. Chin's mother. Other shareholders were Mr. Yet Chiu Chang, a Dr. Lourdes (a friend of Mr. Chang's), the sister of Mr. Chin and a Mr. Hanet. Its officers were Mr. Ng, President and Mr. Chin, Secretary. Its bookkeeper was Mr. Chang. The corporation had a certified public accountant, Jeffrey Foong of 217 Park Row, and an attorney, Richard Wong, also of 217 Park Row.

(b) Jumbo started business in 1979. On its opening night, it had a fire. It had to renovate its premises and recommence business. It had another fire in August 1983. Again, it renovated and recommenced business. At this time, the restaurant obtained a bank loan on the basis of the collateral of a savings bank account owned by Mr. Chin's wife.

(c) On September 2, 1982 Jumbo executed deferred payment agreements with the Division of Taxation for its back taxes for an estimated liability for the periods ending on and before February 28, 1982 of \$70,925.94. Later in March 1983 it executed another agreement for an estimated liability for the periods ending on and before November 30, 1982 of \$99,895.81.

(d) In late 1983 or 1984 the business was sold. The purchaser was Flower Lounge Restaurant, Inc. This purchaser was notified by the Division of Taxation on December 30, 1983

of a bulk sale liability under Tax Law § 1141(c) for the sales taxes owed by Jumbo House in the amount of \$161,379.97 plus interest. Later, however, Flower Lounge was notified that it had been released from this liability.

(e) Mr. Wong, the attorney for Jumbo, held in escrow funds of Jumbo (presumably received from the sale of the business). In April 1987, these funds were about \$12,000.00. Mr. Wong was informed at that time by Mr. George Pugh, the attorney for Mr. Chin, of the Division's assertions of sales taxes and withholding taxes.

(f) From the sale of the business Mr. Chin, as stockholder, received about \$27,000.00. With this he paid off bank loans of \$10,000.00 and \$15,000.00.

Mr. Ng and Mr. Chang were the most active owners in the business. Both dealt with suppliers who were Chinese and who did not speak English. Both Mr. Ng and Mr. Chang could speak Chinese. Mr. Chin could not speak Chinese. Almost all of the business transactions of Jumbo, both the sales and purchases, were done in cash.

(a) Mr. Chin states that his duties with Jumbo involved only dealing with the public when a knowledge of English was necessary. Neither Mr. Ng nor Mr. Chang could speak or read English. These duties would be needed when dealing with non-Chinese customers and in dealing with the government.

(b) Mr. Chin signed some of the sales tax returns of Jumbo. Sometimes he would sign returns with an "X" indicating the name of Mr. Ng. (All returns in evidence had also been rubber stamped with the name of the certified public accountant, Mr. Foong, as preparer.) Mr. Chin signed a Form 2103, withholding tax reconciliation, for the corporation. Mr. Chin acted for the corporation in signing the deferred payment agreements with the Division of Taxation. Mr. Chin and Mr. Ng were authorized to sign checks. All checks required two signatures. Checks were used to pay only the rent, utilities and taxes.

(c) Mr. Chin admits pointing out to Mr. Ng when taxes were due. While Mr. Chin states that Mr. Ng made all decisions concerning payment of taxes, Mr. Chin did not cease exercising his authority to sign checks on behalf of the restaurant when taxes were not paid.

Sales tax returns were filed late and payments made late for the sales tax quarters ending August 31, 1982, November 30, 1982 and August 31, 1983.

(a) A Notice of Deficiency was issued to Benjamin Chin on November 25, 1985 for a penalty under Tax Law § 685(g) of Article 22 of the Tax Law for withholding taxes for the year 1982 in the amount of \$9,348.60.

(b) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner on June 26, 1985 for a penalty for the late filing of returns and late payment of tax due for the period March 1, 1982 through August 31, 1983 (although it did not include the quarter ending February 28, 1983) in the amount of \$10,765.75, plus interest of \$11,425.06, for a total amount due of \$22,190.81. An explanation stated that petitioner was liable individually and as officer of Jumbo House, Inc. under Tax Law §§ 1131(1) and 1133.

#### CONCLUSIONS OF LAW

A. Petitioner is found to be liable for the penalty under Tax Law § 685(g) for failure to pay over the income tax withheld of Jumbo House, Inc. The liability for such a penalty is imposed by Tax Law § 685(g) on "[a]ny person required to collect, truthfully account for, and pay over" the tax, who "willfully fails to collect such tax or truthfully account for and pay over such tax...." The "person" to be held liable is further defined to include an officer or employee of any corporation who as such officer or employee is under a duty to perform the act for which the penalty is imposed (Tax Law § 685[n]). In this case, petitioner claims that his duties were ministerial only. This is in effect a claim that because of the limitations on his duties he was not a "person required to pay over the tax", or that his failure to pay over taxes was not "willful". In either case, he cannot prevail. It is, of course, on petitioner that the burden of proof lies (Matter of Levin v. Gallman, 42 NY2d 32). In this case, the only evidence as to any limitations on petitioner's authority is petitioner's own testimony. He has failed to submit any by-laws of the corporation or other documents which might have corroborated his claim. Likewise, he has failed to secure the testimony, by subpoena or otherwise, of the other officers who might have corroborated his claim. Nothing that petitioner has stated convinces me that petitioner should

escape liability in this case. Certainly the fact, accepted on petitioner's testimony alone, that petitioner was the only officer who knew English does not necessarily mean that petitioner's role in the corporation was ministerial only. In fact quite the contrary, it would normally be expected that the other officers of the corporation would expect such a person to do everything possible to enable the the corporation to meet its obligations.

B. For the same reasons, petitioner is also liable, pursuant to Tax Law §§ 1131(1) and 1133(a), for the sales and use taxes due from Jumbo.

C. The penalties for the late filing of the sales tax returns are due. Such a penalty (and interest) is due under Tax Law § 1145(a)(1)(i) for failure to file a return or pay over any tax on time. The penalty and a portion of the interest (the interest in excess of that computed under Tax Law § 1142[9]) may be remitted if the failure to pay was, in the language of Tax Law § 1145(a)(1)(iii), "due to reasonable cause and not due to willful neglect." That language has been further defined in regulation 20 NYCRR former 536.1 and includes "destruction of...business records by fire or other casualty." In this case, petitioner claims that a fire in August 1983 caused Jumbo to be late in filing and paying sales taxes for the sales tax quarters ending May 31, 1982, August 31, 1982, November 30, 1982, May 31, 1983 and August 31, 1983. It is manifest, however, that the first four returns were due and were late prior to the fire. No explanation has been given of how the fire could have caused the delay in filing those returns. While it is possible that the fire may have caused delay with respect to the last return, petitioner has presented no testimony or other proof directed to the records for that period, their condition or any explanation given of how any alleged lack of records was overcome in the preparation of that return when it was filed.

D. The petitions of Benjamin Chin are denied, and the Notice of Deficiency issued November 25, 1985 and the Notice of Determination and Demand for Payment of Sales and

Use Taxes Due issued June 26, 1985 are sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE